

BEFORE THE DEPARTMENT OF THE INTERIOR
ALASKA NATIVE CLAIMS

APPEAL BOARD	ACT. BY	INIT.	DATE
REALTY OFFICER			
REALTY SPEC.			9/25
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In the matter of eligibility)
of the Villages of Afognak,)
Chitina, Kasaan, Manley Hot)
Springs, and Alexander Creek,)
Anton Larsen Bay, Bells Flats,)
Bettles Field, Caswell,)
Chenega, Chickaloon,)
Chuloonivik, Council, Eyak,)
Haines, Kasilof, King Island,)
Knik, Montana Creek, Pauloff)
Harbor, Point Possession,)
Solomon, Umkumiut, Woody)
Island for benefits under the)
Alaska Native Claims Settle-)
ment Act of December 18, 1971)
(P.L. 92-203; 43 U.S.C. sec.)
1601, et seq.)

Appeal of
Alaska Wildlife Federation and
Sportsmen's Council, Inc., and
Mr. Philip Holdsworth, Mr. James
Boa, and Mr. and Mrs. Harold
Strandberg.

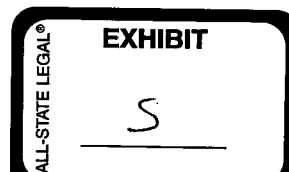
REPLY TO MOTION FOR PRELIMINARY RULING AND
MOTION FOR DECLARATORY ORDER

Come now Alaska Wildlife Federation and Sportsmen's Council, Inc., and Mr. Philip Holdsworth, through their attorney James F. Clark, and join the Juneau Area Director in moving the Board to rule and move for a Declaratory Order prior to any pre-hearing conference or decision in the above-referenced matters as follows:

1. That Congress intended that the words "resided" and "residence", as used in the Act, be defined in their ordinary legal sense, as is set forth in appellants Holdsworth's and Alaska Native Wildlife Federation's brief. (United States v. David, 235 U.S. 561 (1915)).

2. That an Alaska Native is "properly" enrolled to a village for purposes of 43 C.F.R. 2651.2(b)(1) if he was a resident of that village on April 1, 1970 as the word "resident" is defined in paragraph 1 hereof.

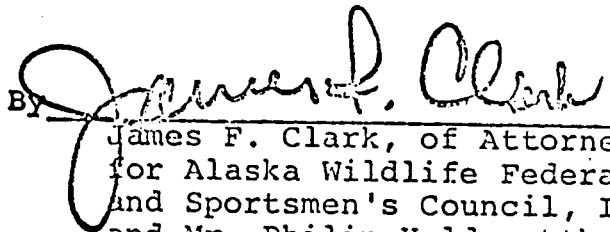
3. That the presumption of official regularity of the Juneau Area Director's decision to enroll a particular Native to a particular village will be rebutted by a showing (from column 18 of the Enrollment Form) that the Native lived in a place other than that village for two years as of April 1, 1970, thus shifting the burden to appellees to show by other indicia of residence that the Native concerned in fact, resided in the disputed village as the term "resided" was intended by Congress to be used in the Act. (see 1 above)



4. That with respect to the following named villages the burden of proving eligibility has shifted to appellees inasmuch as the presumption of official regularity of the residence of the required number of Natives therein has been rebutted by the BIA's own computer print-out of the family roll which shows that all but an insufficient number of Natives to constitute a village, in fact, lived elsewhere for two years as of April 1, 1970: Afognak, Chitina, Kasaan, Manley Hot Springs, Alexander Creek, Anton Larsen Bay, Bells Flats, Bettles Field, Caswell, Chenega, Chickaloon, Chuloonivik, Council, Eyak, Haines, Kasilof, King Island, Knik, Montana Creek, Pauloff Harbor, Point Possession, Solomon, Umkumiut, Woody Island.

DATED this 15th day of April, 1974.

Respectfully submitted,

BY 

James F. Clark, of Attorneys
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and Sportsmen's Council, Inc.
and Mr. Philip Holdsworth,
Mr. James Boa, Mr. and Mrs.
Harold Strandberg.

BRIEF IN SUPPORT OF RESPONSE TO MOTION FOR
PRELIMINARY HEARING AND MOTION FOR
DECLARATORY ORDER

A. RESIDENCE. THE APPELLANTS' APPELLATE BRIEF HAS SET FORTH THE MEANING OF THE WORDS "RESIDED" AND "RESIDENCE" AS THOSE WORDS ARE COMMONLY UNDERSTOOD AT LAW. THAT BRIEF ALSO EXPLAINS WHY CONGRESS INTENDED FOR THIS DEFINITION OF THE WORDS "RESIDED" AND "RESIDENCE" TO BE USED IN THE ACT. ACCORDINGLY, THIS BOARD SHOULD RULE THAT THE WORDS "RESIDED" AND "RESIDENCE" ARE TO BE USED IN THESE PROCEEDINGS IN ACCORDANCE WITH THE DEFINITION SET FORTH IN APPELLANTS' APPELLATE BRIEF.

B. INASMUCH AS CONGRESS INTENDED THAT THE WORDS "RESIDED" AND "RESIDENCE" BE DEFINED IN THEIR ORDINARY LEGAL SENSE, AN ALASKA NATIVE CANNOT BE "PROPERLY" ENROLLED TO A VILLAGE, WITHIN THE MEANING OF 43 C.F.R. 2651.2(b)(1), UNLESS HE WAS, IN FACT, A "RESIDENT" OF THAT VILLAGE AS OF APRIL 1, 1970, AS THAT WORD IS DEFINED IN APPELLANTS' APPELLATE BRIEF.

C. WHILE APPELLANTS RECOGNIZE THAT THE ADMINISTRATIVE DETERMINATIONS OF VILLAGE ELIGIBILITY BY THE JUNEAU AREA DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS ARE CLOTHED IN A PRESUMPTION OF OFFICIAL REGULARITY, THAT PRESUMPTION HAS BEEN REBUTTED BY A COUNTERVAILING PRESUMPTION.

In each administrative determination the Director relied exclusively upon the place of enrollment listed by the enrollee as determination of residence. This is seen from the rationale set forth as follows in a representative sample of an administrative determination:

"The 1972 Census is not, therefore, the exclusive source of information for the determination of residency. Part 43(h) of Title 25 of the Code of Federal Regulations provides for enrollment of the Natives. The main source of 'other evidence satisfactory to the Secretary of the Interior' is the official enrollment, which not only contains evidence of race, but of residence (of the 1970 Census) date as well."

Thus, the Bureau of Indian Affairs Director relied solely on the declarations of intention of the enrollee as reflected in Column 16 of the Enrollment Form, and did not consider such other evidence of residence as column 18 of the same Enrollment Form which showed where the enrollee had lived for two years as of April 1, 1970.

As was pointed out in appellants' appellate brief, a floating intention to return to a place is insufficient to establish residence there. (United States v. David, 235 U.S. 561

(1915); *Hall v. Wake County Board of Elections*, 187 S.E.2d 52 (N.C. 1972)). Moreover, the Director's administrative determinations ignored the presumption that one "resides" where one dwells as set forth by the Supreme Court of the United States in *District of Columbia v. Murphy*, 314 U.S. 441, 455 (1941):

"The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary. (cites omitted) The taxing authority is warranted in treating as prima facie taxable, any person quartered in the District on tax day whose status it deems doubtful. It is not an unreasonable burden upon the individual, who knows best whence he came, what he left behind, and his own attitudes, to require him to establish domicile elsewhere, if he is to escape the tax." (emphasis added)

Likewise, it is not an unreasonable burden upon the Director to show that those claiming residence in villages other than those in which they lived on April 1, 1970 in fact were residents to the places to which they enrolled. This was what was intended by the requirement in 43 C.F.R. 2651.2(a) that he make findings of facts and an investigation with respect to residence. That he has not done so is clear from his own administrative determinations as quoted above.

Accordingly, it is appellants' position that column 18 of the Enrollment Form sets out a rebuttable presumption of the residence of the Natives enrolled under the Act. (See *Pace v. District of Columbia*, 135 F.2d 249 (D.C.Cir. 1943)). Where column 18 and column 16 coincide, the appellants have the burden of proving that that particular Native is, indeed, a resident elsewhere. However, where column 18 reflects that a Native lived in one village for two years as of April 1, 1970 and column 16 lists his "permanent residence" as elsewhere, then the burden is upon the appellees under *Murphy*, *supra* to show that he is a resident of the place listed in column 16 of the Enrollment Form. This is especially so where appellants show that a Native has been voting in a place other than that listed in column 16. (*Griffin v. Matthews*, 310 F.Supp. 341 (M.D.N.C. 1969)). The quantum of proof was described thus in *Hamlin v. Holland*, 256 F.Supp. 25, 27 (1966):

"There is ordinarily a presumption in favor of an original or former domicile as against an acquired one and proof of a change must be clear and convincing."

The procedure which appellants suggest herein is not at all new in the law or in administrative law. There are many instances where the presumption of regularity and the burden of proof as initially placed upon an appellant in a board pro-

ceeding shifts to the appellees. The leading case on this point is Kerner v. Fleming, 283 F.2d 916 (2d Cir. 1960). There the government sought dismissal of an appellant's action because he had the burden of proof and did not meet it. The court held at page 921:

"We may agree that under the cited sections and under section 7(c) of the Administrative Procedure Act, 5 U.S.C.A. §1006(c), an applicant for a disability pension has the ultimate burden of persuasion and that a reviewing court ought not order the grant of a pension to an applicant who has not met this. However, it does not follow that the court is bound to sustain a denial of disability benefits where the applicant has raised a serious question and the evidence affords no sufficient basis for the Secretary's negative answer."

In Robinson v. Richardson, 360 F.Supp. 243 (E.D.N.Y. 1973) the court said at page 248:

"The burden of proving disability rests upon the claimant. (cites omitted) However, if the plaintiff can establish that he cannot continue in his previous line of employment, the burden of going forward shifts to the examiner to establish that there are other jobs available to the plaintiff. (cites omitted) The ultimate burden of proof is of course that of the plaintiff."

For this reason it is perfectly proper procedure for the burden of proof to now shift to the appellees to prove that Natives shown in column 18 to live other than the residence set forth in column 16, prove the propriety of their village of enrollment.

D. THE BURDEN OF PROOF HAS SHIFTED TO THE APPELLEES TO PROVE THAT THE VILLAGES IN FACT EXIST.

In order to qualify as a Native village under the Act, a village must have at least 25 Native residents. With respect to the villages listed in paragraph 4 of the Motion for Declaratory Order there are less than 25 Natives who prima facie qualify as residents. That is to say, with respect to the named villages columns 13 and 16 of the BIA Enrollment Forms do not coincide to show 25 Native residents. Since this is so, the burden of proving the existence of these villages has necessarily shifted to the appellees who must now show that there is a sufficient number of residents to the named village to have it qualify under the Act.

DATED this 15th day of April, 1974.

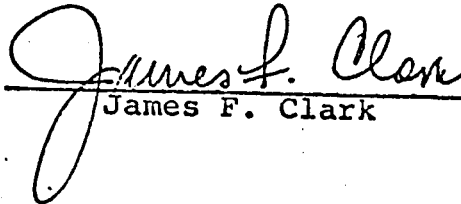
Respectfully submitted,

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I hereby certify that on April 15, 1974, copies of this Reply to Motion for Preliminary Ruling and Motion for Declaratory Order and Brief in Support of Response to Motion for Preliminary Hearing and Motion for Declaratory Order have been sent to the following parties at the addresses indicated by first class mail, postage prepaid.


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